Office-Supreme Court, U.S.
FILED
SEP 28 1983
ALEXANDER L. STEVAS,
CLERK

83-537

No.

In the Supreme Court of the United States

OCTOBER TERM, 1983

MASSACHUSETTS LABORERS
DISTRICT COUNCIL AND LABORERS, LOCAL 609
PETITIONERS

v.

ABREEN CORP. AND
MARTIN BERNARD, ET AL.
RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIRST CIRCUIT

ROBERT M. SEGAL
PAUL F. KELLY*
SEGAL, ROITMAN & COLEMAN
11 Beacon Street
Boston, Massachusetts 02108
(617) 742-0208

***Counsel of Record**

ADDISON C. GETCHELL & SON, INC. · THE LAWYERS' PRINTER · BOSTON

Questions Presented

Whether damages awarded in an action under Section 303 of the Labor Management Relations Act must be proximately caused by union activities violative of Section 8(b)(4)?

Whether the First Circuit Court of Appeals applied an improper legal standard when it held that "... the fact that certain losses may not have resulted directly from the specific acts which evidenced the Union's unlawful intentions is irrelevant so long as the losses are traceable to actions forming a part of the overall secondary activity?"

Whether the lower courts erred in holding petitioner unions liable for $85,000 in damages in circumstances where the damages claimed were not proximately caused by conduct of petitioners that violated Section 303 of the Labor Management Relations Act?

Whether the lower courts erred in holding that first mortgagees who acquired an interest in a shopping mall *after* construction had been completed have standing to sue under Section 303 of the Labor Management Relations Act for damages allegedly incurred by the developer during construction of the shopping mall?

Whether the lower courts properly substituted their judgment regarding plaintiffs' legal capacity for plaintiffs' decision to bring suit as general partners of a first mortgagee?

Table of Contents

Questions Presented	i
Table of Contents	ii
Table of Authorities	iii
Opinions Below	1
Jurisdiction of the Court	1
Statutory Provision Involved	2
Statement of the Case	2
Reasons for Granting the Writ	5
I. The Court Should Resolve the Conflict Among the Circuits Created by the First Circuit's Imposition of a Standard of Causation which Permits Liability for Damages Not Proximately Caused by Union Wrongdoing.	5
II. The Court Should Establish that Persons with a Remote Relationship to a Labor Dispute who Assert Claims in Conflict with the Claims Asserted by a Direct Victim of the Alleged Boycott Do Not Have Standing to Sue Under Section 303, LMRA.	11
Conclusion	15
Appendix	
United States Court of Appeals for the First Circuit Order of Denial on Petition for Rehearing	A1
United States Court of Appeals for the First Circuit Memorandum and Order	A4

United States Court of Appeals for the First Circuit Judgment A8

United States Court of Appeals for the First Circuit Decision, June 14, 1983 A11

United States District Court for the District of Massachusetts Opinion A35

United States District Court for the District of Massachusetts, Judgment Case No. 79-678-MA A46

United States District Court for the District of Massachusetts, Judgment Case No. 79-755-MA A47

Table of Authorities

CASES

Associated General Contractors of California, Inc. v. California State Council of Carpenters, ___ U.S. ___, 103 S.Ct. 897 (1983) 14, 15

Carbon Fuel Co. v. U.M.W., 414 U.S. 212 (1979) 10

Engine Specialties, Inc. v. Bombadier Ltd., 605 F.2d 1 (1st Cir. 1979) 12

Fulton v. Plumbers, Local 598, 695 F.2d 402 (9th Cir. 1982) 12, 13

Great Coastal Express v. Teamsters, 511 F.2d 839 (4th Cir. 1975) *cert. denied*, 425 U.S. 975 (1976) 8

Houston Bldg. and Const. Trades Council [Claude Everett Const.], 136 NLRB 321 (1962) 3

Iodice v. Calabrese, 512 F.2d 383 (2nd Cir. 1976) 8

Laborers, Local No. 41 [Calument Contractors Ass'n], 133 NLRB 512 (1961) 3

Linbeck Const. Corp. v. NLRB, 550 F.2d 311 (5th Cir. 1977) 10

Maxey v. Meatcutters, Local 126, 627 F.2d 912 (9th Cir. 1980) 8

Mead v. Retail Clerk's, 523 F.2d 1371 (9th Cir. 1975) 8, 9

Monarchi-Velikoff v. No. Cent. Ohio Bldg. Trades Council, ____ F. Supp. ____, 113 LRRM 2755 (N.D. Ohio 1983) 8, 9

NLRB v. Electrical Workers, Local 265, 604 F.2d 1091 (3rd Cir. 1979) 3

Noranda Aluminum v. Carpenters, 528 F.2d 1034 (8th Cir.) *cert. denied*, 429 U.S. 835 (1976) 8

Pickens Bond Const. Co. v. Carpenters, Local 690, 586 F.2d 1234 (8th Cir. 1978) 8, 9

Riverside Coal Co. v. United Mine Workers, 410 F.2d 267 (6th Cir.) *cert. denied*, 396 U.S. 846 (1969) 8

Seco, Inc. v. Laborers, Local 135, 515 F. Supp. 495 (E.D. Pa. 1981) 3

Sheet Metal Workers v. Atlas Sheet Metal Co., 384 F.2d 101 (5th Cir. 1967) 8, 9

Summit Valley Industries v. Local 112, Carpenters, 456 U.S. 717 (1982) 5

Teamsters v. Morton, 377 U.S. 252 (1964) 7, 8, 9

United Mine Workers v. Gibbs, 383 U.S. 715 (1966) 8

United Mine Workers v. Osborne, 279 F.2d 716 (6th Cir. 1960) 13

W.J. Milner and Company v. International Brotherhood of Electrical Workers, Local 349, 476 F.2d 8 (5th Cir. 1973) 13

TABLE OF AUTHORITIES

STATUTES

28 U.S.C. § 1254(1) 2

29 U.S.C. § 187 *Passim*

OTHER AUTHORITIES

Comment, Labor Law - Standing - Boycotts And Strikes, 43 U. Cinn. L. Rev. 212 (1974) 13

Comment, Standing to Sue Under Section 303 of the Labor Management Relations Act, 45 N.Y. U.L. Rev. 539 (1970) 13

No.

In the Supreme Court of the United States

OCTOBER TERM, 1983

MASSACHUSETTS LABORERS
DISTRICT COUNCIL AND LABORERS, LOCAL 609
PETITIONERS

v.

ABREEN CORP. AND
MARTIN BERNARD, ET AL.
RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIRST CIRCUIT

Opinions Below

The opinion of the District Court for the District of Massachusetts is reproduced in the Appendix at A35. The opinion of the Court of Appeals for the First Circuit is reported at 709 F.2d 748 and is reproduced in the Appendix at A11.

Jurisdiction of the Court

The judgment of the Court of Appeals for the First Circuit was rendered and entered on June 14, 1983. A copy of the judgment is included in the Appendix at A8. Petitions for Rehearing and a Petition for Rehearing on *En Banc* were

denied by the Court of Appeals for the First Circuit on July 28, 1983. The Memorandum and Order denying the Petitions for Rehearing have been reproduced at A4. The Order denying the Petition for Rehearing *En Banc* is reproduced at A1. The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1254(1).

Statutory Provision Involved

The statutory provision involved in this case is Section 303 of the Labor Management Relations Act, 1947, 29 U.S.C. § 187:

> (a) It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in Section 8 (b)(4) of the National Labor Relations Act, as amended.
>
> (b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefore in any district court of the United States subject to the limitations and provisions of Section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

Statement of the Case

This case arose and the courts below had jurisdiction pursuant to Section 303 of the LMRA, 29 U.S.C. § 187.

The site of the labor dispute which underlies this case was a non-union construction project in Natick, Massachusetts. The developer of the project was SN Realty Trust and the general contractor was Abreen Corp. The steel erection sub-contractor was Seppala & Aho.

On Monday, March 19, 1979 Laborers, Local 609 established a lawful picket line to protest the sub-standard wage

rates paid by Seppala & Aho to its employees.[1] A reserved gate, Gate 1, was established for the use of Seppala & Aho's employees and suppliers. During the week of March 19, 1979, Local 609 confined its picketing to Gate 1.

Durastone Flexicore Corp. was a supplier to Seppala & Aho. Durastone manufactured a hollow core, precast and prestressed roof and floor decking. This material was used in the construction of the hotel on the Natick job site. The material, commonly referred to as flexicore, was shipped by Durastone's trucker from the Durastone plant in Rhode Island to the Natick job site where it was installed by employees of Seppala & Aho. A shipment of flexicore was scheduled to be delivered on Monday, March 26, 1979.

The night before the scheduled delivery, Arthur Coia, then Vice President of Laborers International Union of North America and Aldo Barretta, Vice President of Duraflex Sales and Service, a sales affiliate of Durastone Flexicore, had a telephone conversation in which Mr. Coia told Mr. Barretta "to expect a problem the following morning at the site of the Hilton because the Building Trades Unions were going to picket the job site." The next morning, Mr. Barretta called his shipper and cancelled the scheduled March 26 shipment of flexicore. Shipments of flexicore resumed on Tuesday, April 3, 1979.

During the week in which the scheduled shipments of flexicore were not received, Abreen Corp., in order to avoid any delay in construction, redesigned the second and third floors

[1] The National Labor Relations Board has long recognized the right of a union to picket an employer whose wages are below area standard wages. *Laborers, Local No. 41* [*Calument Contractors Ass'n*], 133 NLRB 512 (1961); *Houston Bldg. and Const. Trades Council* [*Claude Everett Const.*], 136 NLRB 321 (1962). The rationale that supports the union's right to picket is that it is a legitimate and primary concern of a union that employers with whom they have contractual relationships not be put at a competitive disadvantage because of the cost of such contracts. *NLRB v. Electrical Workers, Local 265*, 604 F.2d 1091, 1097 (3rd Cir. 1979); *Seco, Inc. v. Laborers, Local 135*, 515 F. Supp. 495 (E.D. Pa. 1981).

of the hotel so that a poured concrete flooring might be installed in place of the concrete deck.

Suits were filed in the United States District Court for the District of Massachusetts by the general contractor, Abreen Corp. and by Martin Bernard and Isadore Wasserman. Bernard and Wasserman identified themselves as general partners of Natick Village Mall Associates, the holder of the first mortgage on the completed property. The defendants in both actions were the Laborers International Union of North America, AFL-CIO, the Massachusetts Laborers District Council and Laborers, Local 609. The two actions were consolidated for trial. Following a jury waived trial, the district court entered judgment in favor of Abreen Corp. and against the three union defendants jointly and severally for damages of $120,264.38. The elements of damage awarded to Abreen Corp. were as follows: a.) expenses for Natick Police ($17,023.50); b.) attorneys fees ($7,935); c.) photography expenses ($4,621); d.) substitute trucking for landfill ($5,165); and e.) costs associated with the absence of flexicore ($85,519.88).

The district court also entered judgment in favor of the plaintiffs Bernard and Wasserman. The court concluded that the picketing delayed the project for 21 days and awarded damages to Bernard and Wasserman as follows: a.) additional financing of $917 per day for 21 days ($19,257); b.) loss of rental income ($34,660.76); and d.) attorneys fees ($1,185). The total award of damages to plaintiffs Bernard and Wasserman was $55,102.76.

The defendant unions appealed the judgments to the United States Court of Appeals for the First Circuit. Both plaintiffs filed cross-appeals. The Court of Appeals, with one judge dissenting, affirmed the district court's finding that the union defendants had violated Section 303, LMRA. The Court of Appeals reversed the district court's award of damages in favor of Abreen Corp. in three specific instances.

First, the award of attorneys fees was reversed under the authority of *Summit Valley Industries v. Local 112, Carpenters*, 456 U.S. 717 (1982). Second, the award of photography expenses was reversed as litigation expenses. Third, the district court's refusal to award $3,300 in attorneys fees for work done negotiating with Durastone was reversed. Accordingly, the First Circuit reduced the award of damages in favor of Abreen Corp. by $9,256.00.

Similarly, the First Circuit reversed two elements of damage in favor of Bernard and Wasserman. First, the award of attorneys fees in the amount of $1,185.00 was reversed. Second, the award of $19,257.00 for an additional financing was reversed as speculative. Accordingly, the judgment in favor of Bernard and Wasserman was reduced by $20,442.00.

Reasons for Granting the Writ

There are two primary reasons why the writ should be granted: First, the Court of Appeals are divided concerning the relationship between illegal conduct and a Section 303 plaintiff's losses necessary to sustain an award of damages. Second, this Court should settle the question of whether plaintiffs with a remote or indirect relationship to the labor dispute giving rise to the cause of action have standing to sue under Section 303 LMRA.

I. The Court Should Resolve the Conflict Among the Circuits Created by the First Circuit's Imposition of a Standard of Causation which Permits Liability for Damages Not Proximately Caused by Union Wrongdoing.

The petition seeks review of the lower court's award of damages in favor of Abreen Corp. In particular, petitioners

challenge the $85,519.88 damage award that represented costs associated with the absence of flexicore from the job site for a period of five days. The basis for petitioner's challenge to this award is that the loss claimed was not proximately caused by any illegal act engaged in by Local 609 or the Mass. Laborers District Council.

Four factors contributed to the absence of flexicore from the job site. First, a friendly telephone conversation between a representative of the International Union and a representative of Durastone occurred on Sunday, March 25, 1979. This conversation did not involve any agent or official of either the District Council or Local 609. Moreover, the conversation was not threatening to the employer and it contained only truthful information.[2]

Second, Durastone's Vice President instructed his trucking company not to ship flexicore to the Natick job site on Monday, March 26, 1979. This action was taken as a direct result of the previous evening's telephone conversation. It did not result from any illegal act of petitioners.

Third, from Tuesday, March 27 until Monday, April 2, Durastone's employees refused to load trucks sent by Abreen to the Durastone plant. These employees, according to Durastone's plant manager, were acting under orders from their union business manager.[3] The employees' union is a sister local to Local 609 but it was not a party to this suit.

---

[2] This information conveyed was that the employer might "expect a problem the following morning at the site of the Hilton because the building trades unions were going to picket the job site." As a supplier to the primary employer, Durastone trucks would necessarily have confronted the picket line at Gate 1 because that Gate was reserved for Seppala & Aho and its suppliers.

[3] Durastone's plant manager also testified to the presence of Local 609's business manager and some pickets at the Durastone plant two or three days after the Durastone employees initially refused to load Abreen trucks. They were present at the plant only a short time and when requested to leave, they did so. The district

Fourth, Abreen incurred extra costs of $115,519.88 during the five days when flexicore was absent from the site. Abreen's witness testified that costs of delay were approximately $1500.00 per day. Rather than incur delay costs which would have totalled $7500.00, this employer incurred added costs far beyond what petitioners might reasonably have foreseen.[4]

The starting point for analyzing the authorization contained in Section 303(a) for an award of damages in the event of injury "by reason of any violation of sub-section a" is this Court's decision in *Teamsters v. Morton*, 377 U.S. 252 (1964). In that case, the Court made clear that the District Court must distinguish between damages proximately caused by primary activities and damages proximately caused by secondary activities. In so doing, the Court established the standard that damages must be shown to have been caused by the illegal secondary activities of the defendant. The Court stated:

> The District Court was without power to award damages proximately caused by lawful, primary activities, even though the petitioner may have contemporaneously engaged in unlawful acts elsewhere.

377 U.S. at 261-262.

---

court did not find this activity to be illegal and it did not find this activity to have caused any damage to Abreen. The Court of Appeals found that this activity was beyond the "scope of permissible involvement", A29, although the Court of Appeals stopped short of finding that this activity proximately caused damage to Abreen.

[4] Abreen negotiated a credit with Durastone for $25,000.00. This amount represented the value of flexicore which was not used. Abreen paid attorneys $3,300.00 in order to achieve this result. This latter amount was not awarded as damages by the district court but was awarded by the Court of Appeals. The damages awarded to Abreen by the district court arising from the Durastone controversy ($85,519.88) were calculated by sub-contracting Abreen's credit ($25,000.00) from the total added cost ($115,519.88).

Lower courts are in general agreement that proof of damages is not required to be mathematically precise and that damages may be a just and reasonable approximation in circumstances where the precise amount cannot be quantified. *Maxey v. Meatcutters, Local 126*, 627 F.2d 912 (9th Cir. 1980); *Noranda Aluminum v. Carpenters*, 528 F.2d 1304 (8th Cir.) *cert. denied*, 429 U.S. 835 (1976); *Iodice v. Calabrese*, 512 F.2d 383 (2d Cir. 1976); *Sheet Metal Workers v. Atlas Sheet Metal Co.*, 384 F.2d 101 (5th Cir. 1967).

Even though the *amount* of damages may be proven by reasonable approximation, the lower courts have interpreted *Teamsters v. Morton*, 377 U.S. 252 (1964) and Section 303, LMRA as requiring plaintiffs to prove that the illegal acts of the defendants proximately caused the damage claimed. *Pickens Bond Const. Co. v. Carpenters, Local 690*, 586 F.2d 1234 (8th Cir. 1978); *Great Coastal Express v. Teamsters*, 511 F.2d 839 (4th Cir. 1975) *cert. denied*, 425 U.S. 975 (1976); *Mead v. Retail Clerk's*, 523 F.2d 1371 (9th Cir. 1975); *Riverside Coal Co. v. United Mine Workers*, 410 F.2d 267 (6th Cir.) *cert. denied*, 396 U.S. 846 (1969); *Sheet Metal Workers v. Atlas Sheet Metal Co.*, 384 F.2d 101 (5th Cir. 1967); *Monarchi-Velikoff v. No. Cent. Ohio Bldg. Trades Council*, ____ F. Supp. ____, 113 LRRM 2755 (N.D. Ohio 1983).

In *Riverside Coal Co. v. UMW*, 410 F.2d 267 (6th Cir. 1969), for example, the court reviewed an award of damages under Section 303. The Sixth Circuit relied on this Court's decisions in *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966) and *Teamsters v. Morton*, *supra* as authority for the following standard of proof:

> It is clear that in actions seeking damages for alleged illegal conduct by labor unions, the award of damages must be based upon that element of the activity which is in fact violative of state or federal law. But damages may not be awarded where they are the result of lawful activity on the part of the union.

410 F.2d at 275.

Similarly, in *Sheet Metal Workers v. Atlas Sheet Metal Co.*, 384 F.2d 101 (5th Cir. 1967) the court held that section 303 is compensatory in nature "... and damages may only be recovered for actual losses sustained *as a result* of the unlawful secondary activity." 384 F.2d at 109 (emphasis added). The Fifth Circuit further stated that "... all elements of damage must be directly related to or caused by the unlawful secondary activity." 384 F.2d at 110.

In *Mead v. Retail Clerks*, 523 F.2d 1371 (9th Cir. 1975) the court analyzed the "by reason of" language of section 303(b). In that case, the court reviewed a plaintiff's claim that business had declined "by reason of" defendant's secondary activity. Relying on cases construing anti-trust laws, the Ninth Circuit held that the unlawful objective of the union must be shown to have "materially contributed" to plaintiff's loss or have been a "substantial factor" in bringing it about. 523 F.2d at 1376-1379.

Recovery under section 303 is limited to actual, compensatory damages and those damages must be both non-speculative and proximately caused by union wrongdoing. *Pickens Bond Const. Co. v. Local 690, Carpenters*, 586 F.2d 1234 (8th Cir. 1978). Although damages may be assessed as a matter of just and reasonable inference, plaintiffs are not relieved of the burden of establishing proximate cause. *Monarchi-Velikoff, Inc. v. No. Cent. Bldg. Trades Council*, ____ F. Supp. ____, 113 LRRM 2755, 2760 (N.D. Ohio 1983).

In the case at bar, the First Circuit established a new standard which is markedly different from the standard of proximate causation established in *Teamsters v. Morton* and the cases noted above. Here, the First Circuit held that:

> ... the fact that certain losses may not have resulted directly from the specific acts which evidenced the Union's unlawful intentions, is irrelevant so long as the losses are

traceable to actions forming part of the overall secondary activity.

A29.

This case presents an appropriate set of facts upon which this Court can settle the important issue of whether section 303 imposes a lesser burden on plaintiffs than a burden of proving proximate cause. Here, the local union and the MLDC were shown neither to have threatened Durastone management[5] in violation of section 8(b)(4)(ii) nor to have induced Durastone employees in violation of section 8(b)(4)(i). Yet, actions by third parties, Durastone's management and employees, were found to be "traceable to actions forming a part of the overall secondary activity." There is nothing in the record to indicate, and no finding by the trial court, that petitioners' secondary activities in Natick had any effect whatsoever on Durastone's decision, be it a management or employee decision, not to ship supplies to the primary employer. *Compare Teamsters v. Morton*, 377 U.S. 252, 261 n. 18.

Moreover, Durastone was not a neutral secondary employer. As a supplier to Seppala & Aho, Durastone was a permissible target of union appeals. *See Linbeck Const. Corp. v. NLRB*, 550 F.2d 311, 316 (5th Cir. 1977) (suppliers occupy middleground under section 8(b)(4)). Durastone was plainly required to enter the Natick jobsite through Gate 1, the gate reserved for Seppala & Aho *and its suppliers*. Thus, the fact that the picket line was shown to be secondary in that it moved to Gate 2 cannot be relied upon as causing the Durastone losses. The Durastone losses were caused by factors other than petitioners' illegal conduct.

[5] Even if the First Circuit was correct in holding that the International Union violated Section 8(b)(4)(ii), a point not conceded and one petitioners anticipate to be the focus of a separate Petition for a Writ of Certiorari from the International Union, governing principles prohibit imposition of the International's liability upon petitioners absent proof of agency. *See Carbon Fuel Co. v. U.M.W.*, 414 U.S. 212 (1979).

In petitioners' view the Court should make clear, as the cases noted above have done, that plaintiffs must establish a causal link between conduct violative of Section 303 and damages claimed.

II. The Court Should Establish that Persons with a Remote Relationship to a Labor Dispute who Assert Claims in Conflict with the Claims Asserted by a Direct Victim of the Alleged Boycott Do Not Have Standing to Sue Under Section 303, LMRA.

The second reason that this petition should be granted is to settle the question whether Section 303 plaintiffs with a remote relationship to a labor dispute have standing to sue.

Martin Bernard and Isadore Wasserman brought suit under section 303 as general partners of Natick Village Mall Associates (NVMA). NVMA, twelve months after the events which gave rise to this action, received a first mortgage on the completed construction project which was the site of the dispute. The mortgagor and developer of the project was SN Realty Trust. Bernard and Wasserman were trustees of SN Realty Trust but did not assert a Section 303 claim in that capacity.

The claim asserted by Bernard and Wasserman was that the secondary activities of the defendants delayed completion of the project and caused a loss of income from shopping mall tenants. This claim was in direct and unequivocal conflict with the claim of the general contractor who not only asserted that the unions caused no delay in completion of the project but who also asserted that his damages were the increased costs incurred precisely to avoid delay.[6]

[6] The $115,519.88 expended during the five days when flexicore was missing from the job site is an example of the extent the general contractor was willing to go in spending to avoid delay.

The First Circuit saw as "unimportant" the difference between the legal capacity of Bernard and Wasserman as general partners of NVMA and as trustees of SN Realty Trust. According to the First Circuit "the key question is whether Bernard and Wasserman, as developers, have standing under section 303." A17. Petitioners respectfully represent that Bernard and Wasserman, parties whose knowledge of the importance of distinct legal entities is self-evident, chose to assert their claim not as the claim of a developer but as the claim of a lender. Thus, two questions emerge: first, is plaintiffs' legal capacity unimportant and second, do Bernard and Wasserman have standing as either lenders or developers.

In *Fulton v. Plumbers, Local 598*, 695 F.2d 402 (9th Cir. 1982) the Ninth Circuit expressly noted that standing principles established under Section 4 of the Clayton Act should provide guidance to courts considering standing under Section 303 of the Labor Act. In *Fulton*, the Court applied the "target area" test in holding that employees of affected contractors do not have standing to sue for lost wages under Section 303.[7] The Court reasoned that the plaintiff employees did not assert the type of injury that Congress sought to prevent or remedy by enacting the statute, 695 F.2d at 407. Moreover, the Court noted that the purpose of Section 303 was to protect small businessmen and farmers. *Id.* The Court stated:

> We are unable to find any indication that Congress sought to extend the right of action afforded by Section 303 to employees of an injured employer and we are unwilling to render such a broad interpretation of the statute.

695 F.2d at 408.

[7] The First Circuit itself has employed the "target area" test in antitrust cases. In *Engine Specialties, Inc. v. Bombadier Ltd.*, 605 F.2d 1 (1st Cir. 1979) the court ruled that motorcycle distributors who were "hit but not aimed at" were outside the target area which section 4 of the Clayton Act identified and thus they had no standing to sue.

Alternative tests have been proposed by the Sixth Circuit and the Fifth Circuit. In *United Mine Workers v. Osborne*, 279 F.2d 716 (6th Cir. 1960) the Sixth Circuit applied a directness of the injury test[8] in holding that damages claimed by a Commission Sales Agent were "incidental and too remote for recovery under federal law." 279 F.2d at 729. In reaching its decision, the Court relied upon cases interpretating the Sherman Anti-Trust Acts analogous provisions in which damages claimed by third parties were deemed too remote to permit recovery.[9]

In *W.J. Milner and Company v. International Brotherhood of Electrical Workers, Local 849*, 476 F.2d 8 (5th Cir. 1973) the Fifth Circuit enunciated an alternative test which permitted a third party to sue for damages under Section 303 in certain circumstances. Those circumstances are: first, an integrated business enterprise which includes the third party and either the primary or the neutral employer; second, direct injury to the third parties' property; and third, a principal-agent's relationship between the third party and the primary employer. 476 F.2d at 12.

In the cases at bar, the First Circuit stated:

> In this case, illegal picketing which adversely affected Abreen, reasonably could be foreseen to adversely affect Bernard and Wasserman. ... the District Court was correct, therefore, in finding that Bernard and Wasserman had standing to bring suit under Section 303.

A12-18.

This case gives the court the opportunity to explore the relationship between the Sherman Anti-Trust Act and Sec-

[8] *See* discussion of this test in *Fulton v. Plumbers*, 695 F.2d 402, 406 (9th Cir. 1982). *See generally*, Comment, *Standing to Sue Under Section 303 of the Labor Management Relations Act*, 45 N.Y.U.L. Rev. 539 (1970); Comment, *Labor Law-Standing-Boycotts and Strikes*, 43 U. Cinn. L. Rev. 212 (1974).

[9] *See* cases cited in *United Mine Workers v. Osborne*, 279 F.2d at 12.

tion 303 of the Labor Management Relations Act. Petitioner's view Section 303 as providing a remedy to plaintiffs injured by labor boycotts even though no liability would exist under anti-trust law. The appropriate test to be implied by the courts in determining a plaintiffs standing under Section 303 should therefore be the same test as employed in determining standing under Section 4 of the Clayton Act.

The Court has recently examined the standing test to be applied in Clayton Act cases. In *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, ___ U.S. ___, 103 S.Ct. 897 (1983) this Court considered whether a labor organization had standing to sue under Section 4 of the Clayton Act for damages resulting from coercion of certain third parties without a direct showing of injury to itself. In ruling that the union did not have standing to sue, the Court focused on three basic factors: the nature of the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between the harm and the wrongdoing. The Court's conclusion was stated as follows:

> We conclude, therefore, that the Union's allegations of consequential harm resulting from a violation of the anti-trust laws, although buttressed by an allegation of intent to harm the Union, are insufficient as a matter of law. Other relevant factors - the nature of the Union's injury, the tenuous and speculative character of the relationship between the alleged anti-trust violation and the Union's alleged injury, the potential for duplicative recovery or complex apportionment of damages and the existence of more direct victims of the alleged conspiracy - weigh heavily against judicial enforcement of the Union's anti-trust claim.

103 S.Ct. at 913.

In the case at bar, the harm claimed by Bernard and Wasserman was consequential. There was no allegation, no

showing and no finding of intent to harm Bernard and Wasserman. The nature of the injury claimed, lost rents, is both tenuous and duplicative when considered in light of the claim of the general contractor, the direct victim of the boycott. The danger of plaintiffs asserting conflicting claims and resulting multiple liability was cited by the Court as a reason for denying the Union standing to sue under the Clayton Act. *Associated General Contractors, supra*, 103 S.Ct. at 912. Petitioners, in this case, have been subject to conflicting claims and multiple liability. The case presents appropriate facts for the Court's resolution of this issue of standing under Section 303.

Conclusion

For the foregoing reasons, the Court should grant the Writ and review this case because the underlying questions of federal labor law are matters of substantial public importance and concern. For these reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

ROBERT M. SEGAL
PAUL F. KELLY*
SEGAL, ROITMAN & COLEMAN
11 Beacon Street
Boston, Massachusetts 02108
(617) 742-0208

***Counsel of Record**

United States Court of Appeals
For the First Circuit

No. 82-1149

ABREEN CORP.,
PLAINTIFF, APPELLEE,
v.
LABORERS' INTERNATIONAL UNION,
N.A., AFL, AFL-CIO,
DEFENDANT, APPELLANT.

No. 82-1150

ABREEN CORP.,
PLAINTIFF, APPELLEE,
v.
LABORERS' INTERNATIONAL UNION,
N.A., AFL, AFL-CIO, ET AL.,
DEFENDANTS, APPELLEES.

MASSACHUSETTS LABORERS' DISTRICT COUNCIL,
DEFENDANT, APPELLANT.

No. 82-1151

ABREEN CORP.,
PLAINTIFF, APPELLEE,
v.
LABORERS' INTERNATIONAL UNION,
N.A., AFL, AFL-CIO, ET AL.,
DEFENDANTS, APPELLEES.

LABORERS' LOCAL 609,
DEFENDANT, APPELLANT.

No. 82-1158

MARTIN BERNARD, ET AL.,
PLAINTIFFS, APPELLEES,
v.
LABOREPS' INTERNATIONAL UNION
OF NORTH AMERICA,
DEFENDANT, APPELLANT.

No. 82-1159

MARTIN BERNARD, ET AL.,
PLAINTIFFS, APPELLEES,
v.
LABORERS' INTERNATIONAL UNION
OF NORTH AMERICA, ET AL.,
DEFENDANTS, APPELLEES.

LABORERS' LOCAL 609,
DEFENDANT, APPELLANT.

No. 82-1160

MARTIN BERNARD, ET AL.,
PLAINTIFFS, APPELLEES,
v.
LABORERS' INTERNATIONAL UNION
OF NORTH AMERICA, ET AL.,
DEFENDANTS, APPELLEES.

MASSACHUSETTS LABORERS' DISTRICT COUNCIL,
DEFENDANT, APPELLANT.

No. 82-1191

ABREEN CORP.,
PLAINTIFF, APPELLANT,
v.
LABORERS' INTERNATIONAL UNION
OF NORTH AMERICA, AFL-CIO, ET AL.,
DEFENDANTS, APPELLEES.

No. 82-1206

MARTIN BERNARD, ET AL.,
PLAINTIFFS, APPELLANTS,
v.
LABORERS' INTERNATIONAL UNION
OF NORTH AMERICA, ET AL.,
DEFENDANTS, APPELLEES.

Before

Campbell, *Chief Judge*,
Coffin, Bownes and Breyer, *Circuit Judges*.

ORDER

Entered July 28, 1983

The petition for rehearing en banc is hereby denied.

By the Court,

[SIGNED]

Francis P. Scigliano
Clerk.

United States Court of Appeals
For the First Circuit

No. 82-1149

ABREEN CORP.,
PLAINTIFF, APPELLEE,
v.
LABORERS' INTERNATIONAL UNION,
N.A., AFL, AFL-CIO,
DEFENDANT, APPELLANT.

No. 82-1150

ABREEN CORP.,
PLAINTIFF, APPELLEE,
v.
LABORERS' INTERNATIONAL UNION,
N.A., AFL, AFL-CIO, ET AL.,
DEFENDANTS, APPELLEES.

MASSACHUSETTS LABORERS' DISTRICT COUNCIL,
DEFENDANT, APPELLANT.

No. 82-1151

ABREEN CORP.,
PLAINTIFF, APPELLEE,
v.
LABORERS' INTERNATIONAL UNION,
N.A., AFL, AFL-CIO, ET AL.,
DEFENDANTS, APPELLEES.

LABORERS' LOCAL 609,
DEFENDANT, APPELLANT.

No. 82-1158

MARTIN BERNARD, ET AL.,
PLAINTIFFS, APPELLEES,
v.
LABORERS' INTERNATIONAL UNION
OF NORTH AMERICA,
DEFENDANT, APPELLANT.

No. 82-1159

MARTIN BERNARD, ET AL.,
PLAINTIFFS, APPELLEES,
v.
LABORERS' INTERNATIONAL UNION
OF NORTH AMERICA, ET AL.,
DEFENDANTS, APPELLEES.

LABORERS' LOCAL 609,
DEFENDANT, APPELLANT.

No. 82-1160

MARTIN BERNARD, ET AL.,
PLAINTIFFS, APPELLEES,
v.
LABORERS' INTERNATIONAL UNION
OF NORTH AMERICA, ET AL.,
DEFENDANTS, APPELLEES.

MASSACHUSETTS LABORERS' DISTRICT COUNCIL,
DEFENDANT, APPELLANT.

No. 82-1191

ABREEN CORP.,
PLAINTIFF, APPELLANT,
v.
LABORERS' INTERNATIONAL UNION
OF NORTH AMERICA, AFL-CIO, ET AL.,
DEFENDANTS, APPELLEES.

No. 82-1206

MARTIN BERNARD, ET AL.,
PLAINTIFFS, APPELLANTS,
v.
LABORERS' INTERNATIONAL UNION
OF NORTH AMERICA, ET AL.,
DEFENDANTS, APPELLEES.

Before

Campbell, *Chief Judge*,
Peck,* *Senior Circuit Judge*,
and Breyer, *Circuit Judge*.

MEMORANDUM AND ORDER

Entered July 28, 1983

Judges Campbell and Breyer vote to deny the petitions for rehearing. Judge Peck would allow them.

Judges Campbell and Breyer believe there is no need to comment further on the damages arguments put forward by the Local and District Council. These were fully considered. Regarding the International's argument based on *United Steelworkers* v. *NLRB*, 376 U.S. 492 (1964), they agree that

* Of the Sixth Circuit, sitting by designation.

threats of violence or reprisal would not turn primary activity into secondary activity. This court's point, however, is not merely that Coia made a threat but that his threat implied the undertaking of secondary activity, such as, for example, direct economic action against Durastone at Durastone's own plant.

To be sure, Coia's statement, read literally, merely pointed out the existence of the Natick picketing. But in the circumstances the district court was entitled to read more into it that that. Durastone's own employees were represented by a local affiliated with the International. And since the Natick picketing had been in progress for some time and Durastone's employees had informed the company of its support for it, the court could have inferred that an officer of the International would not have made such a call merely to convey such obvious information as that there was picketing in progress at the Natick jobsite. Rather it could reasonably infer that the call from such an individual was intended to put the power of the International behind an implicit threat to take secondary action against Durastone itself.

For clarification, we modify the second sentence in the first full paragraph of our opinion on page 20 to read, "Unions may not, however, threaten other employers, including suppliers, with secondary activity." The word "see" will be inserted before the citations.

Petitions for rehearing denied.

By the Court,

[SIGNED]

Francis P. Scigliano
Clerk.

United States Court of Appeals
For the First Circuit

No. 82-1149

ABREEN CORP.,
PLAINTIFF, APPELLEE,
v.
LABORERS' INTERNATIONAL UNION,
N.A., AFL, AFL-CIO,
DEFENDANT, APPELLANT.

No. 82-1150

ABREEN CORP.,
PLAINTIFF, APPELLEE,
v.
LABORERS' INTERNATIONAL UNION,
N.A., AFL, AFL-CIO, ET AL.,
DEFENDANTS, APPELLEES.

MASSACHUSETTS LABORERS' DISTRICT COUNCIL,
DEFENDANT, APPELLANT.

No. 82-1151

ABREEN CORP.,
PLAINTIFF, APPELLEE,
v.
LABORERS' INTERNATIONAL UNION,
N.A., AFL, AFL-CIO, ET AL.,
DEFENDANTS, APPELLEES.

LABORERS' LOCAL 609,
DEFENDANT, APPELLANT.

No. 82-1158

MARTIN BERNARD, ET AL.,
PLAINTIFFS, APPELLEES,
v.
LABORERS' INTERNATIONAL UNION
OF NORTH AMERICA,
DEFENDANT, APPELLANT.

No. 82-1159

MARTIN BERNARD, ET AL.,
PLAINTIFFS, APPELLEES,
v.
LABORERS' INTERNATIONAL UNION
OF NORTH AMERICA, ET AL.,
DEFENDANTS, APPELLEES.

LABORERS' LOCAL 609,
DEFENDANT, APPELLANT.

No. 82-1160

MARTIN BERNARD, ET AL.,
PLAINTIFFS, APPELLEES,
v.
LABORERS' INTERNATIONAL UNION
OF NORTH AMERICA, ET AL.,
DEFENDANTS, APPELLEES.

MASSACHUSETTS LABORERS' DISTRICT COUNCIL,
DEFENDANT, APPELLANT.

No. 82-1191

ABREEN CORP.,
PLAINTIFF, APPELLANT,
v.
LABORERS' INTERNATIONAL UNION
OF NORTH AMERICA, AFL-CIO, ET AL.,
DEFENDANTS, APPELLEES.

No. 82-1206

MARTIN BERNARD, ET AL.,
PLAINTIFFS, APPELLANTS,
v.
LABORERS' INTERNATIONAL UNION
OF NORTH AMERICA, ET AL.,
DEFENDANTS, APPELLEES.

JUDGMENT

Entered: June 14, 1983

These causes came on to be heard on appeals from the United States District Court for the District of Massachusetts, and were argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged, and decreed as follows: The judgments of the District Court are affirmed in part and reversed in part and the causes are remanded to that Court to enter judgments consistent with the opinion filed this day.

No costs.

By the Court:

[SIGNED]

Francis P. Scigliano
Clerk.

United States Court of Appeals
For the First Circuit

No. 82-1149

ABREEN CORP.,
PLAINTIFF, APPELLEE,
v.
LABORERS' INTERNATIONAL UNION,
N.A., AFL, AFL-CIO,
DEFENDANT, APPELLANT.

No. 82-1150

ABREEN CORP.,
PLAINTIFF, APPELLEE,
v.
LABORERS' INTERNATIONAL UNION,
N.A., AFL, AFL-CIO, ET AL.,
DEFENDANTS, APPELLEES.

MASSACHUSETTS LABORERS' DISTRICT COUNCIL,
DEFENDANT, APPELLANT.

No. 82-1151

ABREEN CORP.,
PLAINTIFF, APPELLEE,
v.
LABORERS' INTERNATIONAL UNION,
N.A., AFL, AFL-CIO, ET AL.,
DEFENDANTS, APPELLEES.

LABORERS' LOCAL 609,
DEFENDANT, APPELLANT.

No. 82-1158

MARTIN BERNARD, ET AL.,
PLAINTIFFS, APPELLEES,
v.
LABORERS' INTERNATIONAL UNION
OF NORTH AMERICA,
DEFENDANT, APPELLANT.

No. 82-1159

MARTIN BERNARD, ET AL.,
PLAINTIFFS, APPELLEES,
v.
LABORERS' INTERNATIONAL UNION
OF NORTH AMERICA, ET AL.,
DEFENDANTS, APPELLEES.

LABORERS' LOCAL 609,
DEFENDANT, APPELLANT.

No. 82-1160

MARTIN BERNARD, ET AL.,
PLAINTIFFS, APPELLEES,
v.
LABORERS' INTERNATIONAL UNION
OF NORTH AMERICA, ET AL.,
DEFENDANTS, APPELLEES.

MASSACHUSETTS LABORERS' DISTRICT COUNCIL,
DEFENDANT, APPELLANT.

No. 82-1191

ABREEN CORP.,
PLAINTIFF, APPELLANT,
v.
LABORERS' INTERNATIONAL UNION
OF NORTH AMERICA, AFL-CIO, ET AL.,
DEFENDANTS, APPELLEES.

No. 82-1206

MARTIN BERNARD, ET AL.,
PLAINTIFFS, APPELLANTS,
v.
LABORERS' INTERNATIONAL UNION
OF NORTH AMERICA, ET AL.,
DEFENDANTS, APPELLEES.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. A. DAVID MAZZONE, *U.S. District Judge*]

Before

Peck,* *Senior Circuit Judge*,
Campbell and Breyer, *Circuit Judges*.

Paul F. Kelly with whom *Segal, Roitman & Coleman* was on brief, for Laborers' Local 609.

Theodore T. Green, Assistant General Counsel, with whom *Harold B. Roitman*, *Segal, Roitman & Coleman*, and *Robert J. Connerton* were on brief, for Laborers' International Union of North America, AFL-CIO.

Robert P. Corcoran, with whom *Stoneman, Chandler & Miller* was on brief, for Abreen Corp.

---

* Of the Sixth Circuit, sitting by designation.

Laurence J. Donoghue, with whom *Deutsch, Weintraub & Glazerman, P.C.* was on brief, for Martin Bernard and Isadore Wasserman.

Richard W. Coleman, Sharon M. Livesey, and *Segal, Roitman & Coleman* on brief, for the Massachusetts Laborers' District Council.

June 14, 1983

CAMPBELL, *Chief Judge*. This labor case requires a resolution of difficult questions concerning illegal secondary activity, and a determination of the extent and amount of liability for such activity. The facts as found by the district court are as follows:

In August 1978 Martin Bernard and Isadore Wasserman secured rights to construct a shopping mall and a Hilton Hotel in Natick, Massachusetts. They contracted with Abreen Corporation ("Abreen"), a Massachusetts general contractor, to perform construction of the project. In the summer of 1978 work began on the project.

On March 19, 1979, Laborers' Local 609 ("Local 609") began picketing a subcontractor, Seppala and Aho ("S&A") at the Abreen work site, protesting its nonunion status and arguing it should pay area standard wages. In response, Abreen established a separate gate (Gate 1) for S&A workers and a second gate (Gate 2) for all other subcontractors.[1] During the week of March 19, 1979, Local 609 confined its picketing to Gate 1.

During the second week of picketing, Local 609 continued to picket Gate 1, but also occasionally picketed Gate 2. On one occasion a Rosenfeld truck delivering concrete for a neutral

---

[1] Abreen actually established three gates at its work site. The third gate was used to isolate nonrelated picketing situations between other subcontractors and their workers. This picketing is irrelevant for purposes of this case. For purposes of this opinion, Gate 1 is S&A's reserve gate, and Gate 2 is the neutral entrance used by other subcontractors at the Abreen site.

supplier was stopped at Gate 2 by Local 609 picketers and Maurice Blumberg, a field representative of Massachusetts Laborers' District Council ("MLDC"), along with several other District Council members. The district court also found that Blumberg threatened to "shoot [the] head off" a truck driver who attempted to make a delivery through Gate 1 and threatened to send a photograph to the local union of a truck driver delivering to suppliers of a plumbing subcontractor through Gate 1. At one stage Blumberg shouted to an Abreen official, Philip Abrams, that the project "would never finish nonunion."

On March 25, 1979, Arthur Coia, Vice President of Laborers' International Union of North America ("IU") placed a telephone call to Aldo Baretta, Vice President of Durastone Flexicore ("Durastone"), supplier of cement planks which S&A was to install for flooring in the project. In the telephone call Coia commented that if Durastone delivered its shipments of cement planks to the project, "there would be a problem," since Durastone's truck drivers would face a picket line. The district court found that as a result of the phone call Durastone cancelled the shipment of planks. Previously, Raymond Baretta, the Plant Manager of Durastone, had been told by the local shop steward that Durastone employees, who were represented by Local 315 of Laborers' International, would not load trucks going to the Natick site. A few days later unidentified picketers led by the Business Agent of Local 609 appeared at Durastone's plant. The record is unclear exactly when this picketing occurred. On March 27, 1979, however, Abreen sent trucks to the Durastone plant to pick up the material. Durastone employees refused to deliver the materials. Abreen then contracted with another supplier.

On March 26, 1979, additional pickets appeared at Gate 2 of the Natick site carrying "minority" picket signs. These pickets failed to direct their protests at any particular

employer. These picketers protested the treatment of blacks and other minorities at the work site, contending that they deserved higher wages. On March 27, James Merloni, Jr., Vice President of Local 609, was present at both gates and removed a minority worker's sign from the trunk of his car and gave it to an individual who began picketing at Gate 2. Later that day Merloni directed a "minority workers" picketer to a point between Gate 1 and Gate 2.

During the week of April 2, picketing continued exclusively at Gate 1. On April 16, 1979, Abreen shut the work site down for Patriot's Day, an unscheduled holiday, as requested by the Natick police. Local 609 held a rally featuring speeches at the work site, urging S&A workers to unionize. Thereafter, picketing was only sporadic.

After the project was completed in March 1980, Abreen and Bernard and Wasserman both instituted suits against the three unions, Local 609, MLDC and IU, alleging damages as a result of illegal secondary picketing at the job site. In November 1981, the district court joined both cases and set a trial date. On December 16, 1981, after a four-day trial, the court found that illegal secondary picketing had occurred and held all three unions jointly and severally liable. The district court awarded Abreen $120,264.38 and Bernard and Wasserman $55,102.76 in damages. All parties appealed.

On appeal each union disclaims liability and in the alternative contends that the district court's damages award was excessive. Further, they argue Bernard and Wasserman did not have standing to sue under section 303 of the Labor Management Relations Act of 1947, 29 U.S.C. § 187 ("LMRA"). On the other hand, Bernard and Wasserman argue they have standing to sue and join with Abreen in contending their damages award was insufficient.

We hold Bernard and Wasserman have standing to sue in this case. We affirm the determination of the district court that Local 609, IU and the MLDC violated section 303. We find erroneous, however, several aspects of the district court's award of damages.

I. STANDING TO SUE

Appellant unions initially contend that Bernard and Wasserman, acting through the Natick Village Mall Associates ("NVMA") lacked standing to sue under section 303 of the LMRA. They allege the organization was formed over a year after the events of this case, that the injury to NVMA was remote and indirect, and that the zone of interest protected by section 303 did not encompass NVMA. We disagree.

NVMA was formed twelve months after the crucial events in this case, but it was only an alter ego of SN Realty Trust with Bernard and Wasserman as its general partners. All of the assets, including the land and other rights affected by this case, were transferred to NVMA. We, therefore, find the difference in legal entities unimportant in this case. *See Abbott* v. *Local Union 142*, 429 F.2d 786 (5th Cir. 1970). The key question is whether Bernard and Wasserman, as developers, have standing under section 303.

In *W.J. Milner & Co.* v. *IBEW, Local 349*, 476 F.2d 8 (5th Cir. 1973), the court, with the caveat that the list was not exhaustive, proffered three circumstances where a court could find a third party was sufficiently affected by a union's illegal secondary picketing to sustain liability: (1) where it was established the third party was part of an integrated business with either a neutral or the primary employer; (2) where the third party was directly injured by the actions of the union; and (3) where a principal-agent relationship was shown between the third party and primary employer. *Id.* at 12. In this case illegal picketing which adversely affected Abreen reasonably could be foreseen to adversely affect Bernard and Wasserman. *W.J. Milner*, 476 F.2d 8 (where sales agent of primary employer directly in line of fire of secondary boycott, and injury to such agent reasonably foreseeable by union, standing established under section 303); *Pennsylvania R.R. Co.* v. *National Maritime Union*, 206 F. Supp. 797 (E.D. Pa.

1962) (third party has standing to sue where union's object in illegal secondary picketing injured third party just as it had hoped to). The district court was correct, therefore, in finding that Bernard and Wasserman had standing to bring suit under section 303.

Alternatively, several courts have held that where a third party is the owner of property allegedly injured by illegal secondary activity, this is a sufficient basis for bringing suit under section 303. *Allentown Racquetball & Health Club, Inc.* v. *Building & Construction Trades Council*, 525 F. Supp. 156 (E.D. Pa. 1981) (owner of health club had standing to sue under section 303 for damages resulting from secondary picketing at construction site); *Pennsylvania R.R. Co.*, 206 F. Supp. 797 (owner of ore unloading facility had standing under section 303 where object and purpose of illegal secondary picketing affected him). In this case, as in *Allentown* and *Pennsylvania R.R. Co.*, Bernard and Wasserman were the owners of the construction sites. Further, it was alleged that the object of Local 609's picketing was to impede construction at the site. We hold, therefore, that the owners of a construction site who allege that they were directly injured by illegal secondary picketing, have standing to sue under section 303.[2]

[2] After argument was heard in this case the Supreme Court issued its opinion in *Associated General Contractors* v. *California State Council of Carpenters*, 51 U.S.L.W. 4139 (Feb. 22, 1983). Local 609, in a supplemental memorandum of law, argues that the Supreme Court's decision requires us to find that Bernard and Wasserman lack standing. We disagree. In *Associated General Contractors* the Supreme Court held that a union could not sue under the Clayton Act for damages resulting from alleged coercion of an employer organization of certain third parties without a direct showing of injury to itself. In reaching its decision the Court relied upon the fact that antitrust laws were designed to protect consumers and competitors from anticompetitive practices, and that unions, which typically serve to restrain competition, do not fall within the law's protected zone of interest. The Court further noted that union-management relations were governed by the national labor law. None of these factors are present here. Accordingly, we do not find *Associated General Contractors* to be controlling.

II. LIABILITY OF THE DEFENDANTS

Appellant Local 609 contends on appeal that the district court erred in finding a violation of section 8(b)(4)(ii)(B) of the NLRA, 29 U.S.C. § 158(b)(4)(ii)(B).[3] We disagree.

Section 158(b)(4)(ii)(B) states,

> (b) It shall be an unfair labor practice for a labor organization or its agents —
>
> * * *
>
> (4)(ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is —
>
> * * *
>
> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing.

This section expressly proscribes secondary activity by unions but allows them to engage in primary activity. It has been said that the distinction between primary and secondary activity depends upon "the object of the union's picketing." *Allied Concrete, Inc.* v. *NLRB*, 607 F.2d 827 (9th Cir. 1979). *See Electrical Workers* v. *NLRB*, 366 U.S. 667 (1961); *NLRB* v. *Denver Building Council*, 341 U.S. 675, 689 (1951); *see also*

[3] Under section 303 a union may be found civilly liable for violations of section 8(b)(4) of the NLRA.

Pickens-Bond Construction Co. v. *United Brotherhood of Carpenters Local 690*, 586 F.2d 1234 (8th cir. 1978); *Carpenters District Council of Southern Colorado* v. *NLRB*, 560 F.2d 1015 (10th cir. 1977); *T.W. Helgesen, Inc.* v. *International Association of Bridge, Structural, & Ornamental Ironworkers, Local 498*, 548 F.2d 175 (7th Cir. 1977). If the object of the union's conduct is to put direct pressure on the employer with whom the union has a dispute, the conduct is primary and lawful. *See Allied Concrete, Inc.* v. *NLRB*, 607 F.2d at 830. If, on the other hand, the object of the union's conduct, taken as a whole, is to bring indirect pressure on the primary employer by involving neutral or secondary employers in the dispute, the conduct is secondary and prohibited. *Id.* Often, of course, the union will have more than one goal, but so long as *an* object of the conduct is secondary, the conduct is unlawful. *NLRB* v. *Denver Building Council*, 341 U.S. at 689; *Texas Distributors, Inc.* v. *Local Union No. 100, United Association of Journeymen*, 598 F.2d 393 (5th Cir. 1979); *Pickens-Bond Construction Co.* v. *United Brotherhood of Carpenters Local 690*, 586 F.2d at 1241.

As a practical matter, the object of the union's actions must be determined by analyzing the nature of the union's conduct to see whether the pressure being put on other employers is occurring merely incidentally to the pressure imposed on the primary employer, or directly with the central goal of involving the secondary employer in the dispute. This analysis of the union's conduct always involves difficult factual determinations, but the inquiry is particularly difficult in cases such as this one involving a common situs, where the union's actions can be seen as directed at either the primary employer or the secondary employer. *T.W. Helgesen, Inc.* v. *International Association of Bridge, Structural, & Ornamental Ironworkers, Local 498*, 548 F.2d 175 (7th Cir. 1977). To aid in the line-drawing necessary in such cases, the National Labor Relations Board in *Sailor's Union of the Pacific* (*Moore*

Dry Dock), 92 NLRB 547 (1950), set forth a four-part test. Under that test, picketing of a common situs will be presumed primary if

1) the picketing is strictly limited to times when the primary employer is at the situs;
2) the picketing is limited to times when the employer is engaged in work at the situs;
3) the picketing is limited to places reasonably close to location of the employer;
4) the picketing clearly identifies that the dispute is with the primary employer.

The *Moore Dry Dock* test, however, is merely "an evidentiary tool." *International Association of Bridge, Structural & Ornamental Ironworkers, Local 433* v. *NLRB*, 598 F.2d 1154, 1157 (9th Cir. 1979); *see also Carpenters District Council of Southern Colorado* v. *NLRB*, 560 F.2d 1015. R. Gorman, *Labor Law* at 251. If the trier of fact finds that in the totality of circumstances the union's actions put impermissible direct pressure upon a secondary employer, the union may be found liable despite literal compliance with the *Moore Dry Dock* standard. *See, e.g.*, 598 F.2d at 399; 560 F.2d at 1015.

The pivotal issue, in any case, is the union's intent. This factual question is primarily for the district court to decide. *Pickens-Bond Construction Co.* v. *United Brotherhood of Carpenters Local 690*, 586 F.2d at 1234. Often, as here, the evidence will be conflicting and confused, and the inferences to be drawn susceptible of more than one interpretation. The district court's "[s]election among permissible inferences raised" will only be overturned on appeal if it is clearly erroneous. *Id.* at 1240.

A. *Local 609's Liability*

We do not find the district court's conclusion that Local 609's picketing was unlawful secondary activity to be clearly erroneous. When picketing will potentially involve neutral

parties, the union has an obligation to "picket with restraint" and make sure that its actions do not put undue pressure on secondary employers. *Allied Concrete, Inc.* v. *NLRB*, 607 F.2d 827, 830 (9th cir. 1979). In the instant case, there was considerable evidence that the union did not do that. Although the union claims to have only been engaged in lawful area standards picketing aimed at S&A,[4] there is evidence in the record from which the district court could conclude that the minority picketing was controlled by James Merloni, Vice President of Local 609. This picketing clearly violated the *Moore Dry Dock* standard in that the picketing was conducted at the neutral gate and the signs failed to identify both the union behind the picketing and at whom the picketing was directed.

The minority picketing was but one of several actions from which the district court could conclude that the union's actions at Natick put unlawful pressure on neutral employers. There was evidence that Maurice Blumberg, field representative of the District Council, who participated in much of the picketing activity, told Abreen officers that the job would not finish "nonunion." From this statement the district court could infer that the unions tried to pressure Abreen to cease dealing with nonunion subcontractors. *See Pickens-Bond Construction Co.* v. *United Brotherhood of Carpenters Local 690*, 586 F.2d 1234 (5th Cir. 1978) (secondary objective can be inferred from union official's comment that picketing would stop when nonunion subcontractor left the job site).

Evidence also established that the unions put impermissible pressure on third parties besides Abreen. Members of Local 609 carried unidentified pickets in front of the Durastone plant in Rhode Island. Durastone was a supplier of S&A, the

[4] Area standard picketing is picketing by a union to protest the fact that an employer is nonunion and is paying below the wage rates established in the area by union pressure. Such picketing, if properly conducted, is lawful. *See, e.g.*, NLRB v. *International Brotherhood of Electrical Workers, Local 265*, 604 F.2d 1091, 1097 (8th Cir. 1979).

primary employer. Deliveries of suppliers traditionally are seen as "occupying a middleground in the spectrum of permissible activity under 8(b)(4)." *Linbeck Construction Corp.* v. *NLRB*, 550 F.2d 311, 316 (5th Cir. 1977). Some appeals to them, such as by an identifiable picket sign at the primary employer's gate, are permissible as incidental to the pressure on the primary employer. *See United Steelworkers of America* v. *NLRB* (*Carrier Corp.*), 376 U.S. 492 (1964); *Local 761, International Union of Electrical Workers* v. *NLRB*, 366 U.S. 667 (1961). And at least one court has held that unions may supplement a picket line by making limited requests off the site to those who would normally encounter the line to honor it. *Anchortank, Inc.* v. NLRB, 601 F.2d 233, 240 (5th Cir. 1979). In this case, however, Local 609's appeal to the Durastone employees was of a far different sort. There was no simple request to honor the picket line at Gate 1; there was instead unidentified picketing at the Durastone plant. This may reasonably have been interpreted by the district court as an attempt to stir up trouble at Durastone to pressure it not to deal with Abreen and S&A. Such conduct goes beyond the scope of permissible involvement of secondary employees.

Evidence at trial also supported the district court's conclusion that Local 609, often with the aid of Maurice Blumberg of the District Council, made impermissible appeals to neutral employees at the Natick site. The record shows that at least one of the trucks Local 609 stopped at Gate 1 was not a truck of an S&A supplier, and that the union officials knew that. While the union had a right to picket at Gate 1, it had no right to threaten to take the photograph of a driver known not to be delivering supplies to S&A.

The district court also found that the main picket line sometimes moved to Gate 2 and at one point prevented a concrete truck from entering the site through that gate. The truck, according to unrebutted testimony, was not supplying S&A. Appellants argue they had a right to stop it anyway because

it was a concrete truck and S&A was a concrete subcontractor. *See J.F. Hoff Electrical Co.* v. *NLRB*, 642 F.2d 1266, 1271 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 918 (1981). There is no evidence in the record, however, that the picketers ever sought to ascertain if the truck was destined for S&A, or even that they actually believed it was an S&A supplier. Given these facts, and the other evidence in the case including Local 609's activity at Gate 2 in the guise of minority picketing, we think the district court could permissibly infer that the incident evidenced Local 609's desire to involve neutrals in the dispute. Accordingly, while we might hesitate to uphold a finding of liability based upon only one of the many incidents dicussed above, we believe that given the various unlawful actions, the district court did not commit clear error in finding that the union's course of conduct was unlawful.

B. *Liability of the MLDC and IU*

Both the MLDC and the International argue that the district court erred by finding them jointly and severally liable with Local 609. We disagree.

An international or regional affiliate of a local union may not be liable for the local's unfair labor practices merely by virtue of its affiliation with the local. *Carbon Fuel Co.* v. *United Mine Workers*, 444 U.S. 212 (1979). The regional or international, however, may be liable if it either has an agency relationship with the local, *id.*, or independently participates in the local's illegal conduct. *Cf. id.* at 213 (international cannot be liable when it has neither instigated, supported, ratified or encouraged union's unlawful activity); *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 735 (1966) (same); *NLRB* v. *Local 1016, United Brotherhood of Carpenters*, 273 F.2d 686 (2d Cir. 1960) (same). Here, there was sufficient evidence of the District Council and International's participation in and support of the unlawful conduct to hold them jointly and severally liable with the local.

The record shows that MLDC representative Blumberg was actively involved in the illegal conduct. He appeared at the construction site on numerous occasions. The district court found that on March 28, Blumberg participated in the picketing of Gate 1 and threatened to shoot the head off a trucker attempting to enter through the gate. On March 29, he joined the picketing at Gate 2 and on occasion helped turn away a neutral concrete supplier. Blumberg also commented to an Abreen official that the "job would never finish non-union." Given all of these facts, the district court did not err in finding that the MLDC, through its agent Blumberg, participated in the unlawful activity.[5]

The International's relationship to the illegal conduct poses a more difficult question. The only contact IU had with the picketing was the telephone call from IU's Vice President Arthur Coia to Vice President Baretta of Durastone the day before the secondary activity began. The question here is whether the district court could supportably find that Coia's phone call constituted participation in the illegal conduct. While the question is close, we think that the answer is yes.

Unions may make peaceful appeals for support from the management of companies dealing with the primary employer, *NLRB* v. *Servette, Inc.*, 377 U.S. 46 (1964). Unions may not, however, threaten other employers, including suppliers, with secondary activity. *See NLRB* v. *Local 307, Plumbers*, 469 F.2d 403 (7th Cir. 1972); *NLRB* v. *Plumbers*

[5] The MLDC argues that it should not be liable for Blumberg's actions because there was no evidence that his superiors were aware of his conduct. The record shows, however, that Blumberg was an employee of the District Council and was given a significant amount of discretion in carrying out his job. From these facts and the amount of time Blumberg spent at the site, the district court could reasonably infer that Blumberg was acting in his capacity as agent of the MLDC. This conclusion is further supported by the fact that the President of MLDC spoke at a rally on behalf of Local 609. This permitted an inference that the District Council's highest officers were supporting Local 609 and were likely aware of Blumberg's actions on behalf of the local.

Union, Local 457, 299 F.2d 497 (1962). If Coia's phone call to Baretta constituted such a threat on behalf of Local 609, IU could be found to have participated in Local 609's illegal conduct and be jointly and severally liable for the plaintiffs' damages.

We considered a phone conversation similar to Coia's in *NLRB* v. *Local 254, Building Service Employees*, 359 F.2d 289 (1st Cir. 1966). In that case the union was involved in a collective bargaining dispute with University Cleaning Company, which furnished cleaning and janitorial services to various customers in the Boston area, including United Airlines and the Great Atlantic & Pacific Tea Company (A&P). Union officials telephoned the management of both United Airlines and the A&P informing them that the union would picket University Cleaning at their respective offices the next day. Pickets then appeared the next day. Despite the fact that union officials had only one brief conversation with A&P officers and that no express threats were made, we found that the Board was justified in finding the conversation an unlawful threat to force A&P to cease doing business with University Cleaning. We noted that

> The language used must be taken in the circumstances surrounding the case. Words harmless in themselves can take on a sinister meaning in the context in which they are used.... For one thing, there was a labor dispute going on between the Union and University and that alone puts the activities of the Union with reference to University's customers in a different light. The implications of the conversation are clear.

Id. at 291 (citations and footnotes omitted).

In the instant case, Baretta testified that the tone of his conversation with Coia was friendly and the district court did not expressly hold that Coia's conversation constituted a threat. From these facts appellants argue that the district court held IU liable merely because of the fact that the Inter-

national was affiliated with the local. We do not think this is a fair reading of the district court's opinion. The court found that "It makes no difference if the tone of the call was friendly; the message was clear — the pre-cast concrete was not to be delivered — and the message had the desired effect." In other words, the district court reached a similar conclusion to that reached by the Board in *Local 254*. The court found that despite the tone of the phone call, Coia was implicitly threatening Baretta with economic pressure if Durastone delivered the pre-cast concrete. The context in which the call was made supports this interpretation. Although the mere fact of affiliation is insufficient to assess liability, the district court was not required to ignore the relationship among the parties in construing the meaning of Coia's conversation. Given the fact that IU was affiliated with both Local 609 and the local that represented Durastone's own employees, it was not unreasonable for the district court to infer that Coia was conveying a veiled threat to Durastone of labor trouble unless it honored Local 609's picket lines. This inference is further supported by the fact that Durastone's own employees had previously stated their refusal to deliver to the Natick site. Therefore, at the time of the phone call, Durastone would have been aware of the sympathies of its own employees and would have felt vulnerable to pressure exerted by IU. Moreover, Baretta testified that he had had some problems with Coia in the past. Accordingly, we cannot say that the district court erred in finding the International jointly and severally liable for Local 609's and MDLC's illegal conduct.

III. Damages

Appellant labor unions contend the award of damages by the district court both to Abreen and to Bernard and Wasserman was improper. On the other hand, Abreen argues it should have received compensation for lost wages, lost

business profits and attorneys' fees. Bernard and Wasserman seek additional sums for their attorneys' fees and compensation for lost wages of officials who had to deal with problems resulting from the picketing. We affirm the district court's award of damages in part and reverse in part.

A. *Abreen*

In order to receive damages under section 303 a plaintiff must demonstrate that the damages occurred "by reason of" the unlawful conduct. *Local 20, Teamsters Union* v. *Morton*, 377 U.S. 252 (1964). In the instant case appellants argue that the district court erred in awarding damages to Abreen because there was no evidence that the damages resulted from the unions' unlawful conduct. We disagree.

The district court awarded Abreen $85,519.88 for losses incurred as a result of Durastone's failure to supply concrete planks. The district court found that Durastone cancelled its shipment of planks to Natick because of Coia's phone call to Baretta. After the shipment was cancelled, Abreen then sent trucks to Durastone's plant. Durastone employees refused to load the trucks. Consequently, Abreen was forced to find substitute suppliers. From this sequence of events, the unions argue that there was no causal connection between Abreen's damages and any illegal conduct.

We think the unions' argument depends on an overly narrow conception of secondary activity. It presumes that the only activities which are prohibited, and hence for which the union may be liable, are those particular actions which so clearly impose impermissible pressure upon a secondary employer that they would be found illegal under all circumstances. What this analysis ignores is that the trier of fact must look at the totality of circumstances, *see, e.g., International Association of Bridge, Structural, & Ornamental Ironworkers, Local 433* v. *NLRB*, 598 F.2d 1154 (9th Cir. 1979);

Carpenters District Council of Southern Colorado v. *NLRB*, 560 F.2d 1015 (10th Cir. 1977), and that where a substantial portion of a union's conduct is undeniably secondary, the trier of fact may conclude that the activity as a whole had an unlawful object and illegally pressured secondary employers. Accordingly, the fact that certain losses may not have resulted directly from the specific acts which evidenced the unions' unlawful intentions is irrelevant so long as the losses are traceable to actions forming part of the overall secondary activity. *But see Riverside Coal Co.* v. *United Mine Workers*, 410 F.2d 267, 275 (6th Cir.) (damages may be assessed only for losses resulting from the specific acts of conduct that are clearly unlawful), *cert. denied*, 396 U.S. 846 (1969).

In the instant case our review of the record convinces us that the district court did not err in finding that the concrete planks were not available to Abreen as a result of the picketing at the Natick site which was unlawful. Even if the final "intervening factor" in the causal chain here was the refusal of Durastone employees to load the Abreen trucks, the court could supportably find on this record that that refusal resulted from Local 609's unlawful activities in Natick.[6]

Moreover, this is not a case in which losses were incurred merely as a result of employees of a supplier independently deciding to honor a lawful picket line. Direct and unlawful pressure was put upon Durastone. *See supra*. This pressure upon Durastone might well have contributed substantially to Durastone's employees' refusal to load the Abreen truck. *See Mead* v. *Retail Clerks International Association, Local 839*, 523 F.2d 1371, 1377 (9th Cir. 1975). On this record, we cannot find that the district court erred in attributing the $85,519.88 in damages to the unlawful activity.

[6] The refusal may also have occurred as a result of Local 609's picketing of the Durastone plant. The record is unclear, however, as to when the picketing occurred in relationship to the refusal to load the Abreen trucks. *See supra*.

Appellants also challenge the district court's award of $5,165 for costs incurred when Henly Lundgren failed to haul gravel to and from the work site as he had agreed to do. We do not think that the district court was clearly erroneous in finding that these costs were a result of the union's unlawful conduct. Evidence at the trial showed that Lundgren did not haul the gravel because of the picket lines. As noted above, the district court did not have to find that Lundgren's refusal stemmed directly from one of the acts which evidenced the union's unlawful intentions in order to award damages. The fact that the refusal to deal resulted from the picketing during the period in which it was illegal was sufficient to sustain the award of damages.

We agree with appellants, however, that the district court erred in awarding $7,935 in attorneys' fees for expenses incurred in efforts to stop the picketing. In *Summit Valley Industries* v. *Local 112, United Brotherhood of Carpenters*, 50 U.S.L.W. 4568 (June 1, 1982), the Supreme Court held that the American Rule applied and that in the absence of bad faith on the part of the defendants, plaintiffs cannot recover attorneys' fees in section 303 actions for work done in successful litigation before the Board. Here there was no evidence that the defendants acted in bad faith. Nevertheless, Abreen argues that attorneys' fees should be allowable because the fees did not arise from actual litigation before the Board.[7] We do not think that fact serves to meaningfully distinguish this case from *Summit Valley*. In both *Summit Valley* and the instant case the attorneys' fees were incurred in order to achieve the termination of unlawful picketing. The fact that the picketing stopped in the present case before the Board heard the case provides no reason for granting attorneys' fees.

[7] The record is unclear whether Abreen ever brought a proceeding before the Board or merely planned to do so. The record shows, however, that some kind of settlement terminating the picketing was reached prior to the Board's taking any action.

We similarly find that the district court erred in awarding Abreen $4,621 in photographic expenses. These expenses were incurred in order to obtain evidence for proceedings before the Board and the district court. They were, therefore, litigation expenses and not the kind of actual damages compensable under section 303. *See Summit Valley, supra.*

On cross-appeal Abreen argues that the district court erred in refusing to award $3,000 in attorneys' fees for work done negotiating with Durastone. We agree with Abreen that these expenses which do not relate to attempts to terminate the picketing are compensable as actual damages. The fact that the $3,300 went to attorneys' fees does not distinguish these damages from other expenses incurred by Abreen when Durastone refused to supply the concrete planks. We therefore reverse the district court's refusal to award this amount.

We have examined the other issues relating to damages raised by the parties and find no other errors in the award to Abreen.

B. *Bernard and Wasserman*

The district court awarded $55,102.76 in damages to Bernard and Wasserman. $1,185 of those damages were for attorneys' fees incurred in efforts to stop the unlawful picketing. For reasons discussed above, we reverse that portion of the award.

Appellants argue that the district court erred in awarding damages for lost rental fees due to delay to the construction site. The record shows that one shop, K-Mart, was ready for fixturing at the time of the picketing and that the fixturing trucks did not enter the site because of the picketing. The district court, therefore, did not err in awarding damages resulting from the delay to the K-Mart's opening. The evidence is much less clear as to the other shops. Bernard testified that

the project as a whole was delayed for six months and that two months of that delay was due to the picketing. There was also testimony that the picketing caused considerable disruption to the entire site. From this evidence the district court concluded that the illegal picketing delayed the entire project by 21 days, the amount of time in which the K-Mart was delayed. Because damages in a section 303 action need not be proven with precision, *Abbott* v. *Local 142 of United Association of Journeymen*, 429 F.2d 786 (5th Cir. 1970), we find that the district court did not err in awarding 21 days of lost rental income for the entire project.

We agree with the unions, however, that the district court erred in awarding $19,257 for additional financing charges caused by the delay to the construction. Damages in a section 303 action cannot be speculative. *Pickens-Bond Construction* v. *United Brotherhood of Carpenters Local 690*, 586 F.2d 1234, 1241 (8th Cir. 1978). Here the only evidence supporting the award was Bernard's testimony that he could have refinanced the construction loans at lower interest rates had the project finished earlier. Bernard admitted, however, that he could not be certain about this. No other testimony or documentary evidence was offered to establish the availability of lower financing. Given the fact that the extent of the delay was itself unclear, we do not think that Bernard's conclusory and self-serving testimony was sufficient in itself to sustain the award of damages. We therefore reverse this part of the record.

We find no other errors in the district court's award of damages to Bernard and Wasserman.

Affirmed in part and reversed in part.

PECK, *Senior Circuit Judge, concurring in part, dissenting in part.* Although I agree with most of the majority's well written opinion I must note my disagreement with the determination that Laborers' International Union of North America (IU) is jointly and severally liable for damages resulting from illegal secondary activity at the Abreen construction site. The district court's findings are far too tenuous to support such a conclusion.

The district court found IU liable based on its "participation" in illegal secondary picketing at the Abreen construction site and because of its "close relationship" with Local 609. In my view, neither basis is supported by law or the record in this case.

Courts faced with the question of whether an international union is liable for the acts of its local have employed concepts of agency law to resolve the issue. *Carbon Fuel Co. v. UMW*, 444 U.S. 212 (1979); *Coronado Coal Co. v. UMW*, 268 U.S. 295 (1925). In *Carbon Fuel* the Supreme Court held that where an international did not instigate, support, ratify, or participate in an illegal wildcat strike, it was not liable to the employer injured by the action. *Supra* at 218. Here, the district court found IU participated in illegal activity by Local 609 based solely on one phone call between Coia, Vice President of IU, and Baretta, Vice President of Durastone Flexicore. Both Coia and Baretta agreed the phone call was friendly and made to inform Baretta of the picket line at Gate 1, a picket line which Local 609 could lawfully establish. There is no evidence IU officials ever appeared at the work site nor was any other link with illegal secondary picketing shown. Courts have required far more before imposing liability on an international requiring actual participation in the illegal secondary activity itself. *Carbon Fuel, supra* at 217 n. 6; *United States Steel Corp. v. UMW*, 598 F.2d 363, 367 (5th Cir. 1979); *NLRB v. Local 1016, United Brotherhood of Carpenters & Joiners of America*, 273 F.2d 686, 688 (2d Cir. 1960);

Nassau & Suffolk Building Trades Council (Theresa Gardens Apartments, Inc.), 162 N.L.R.B. 180, 190 (1966). Clearly the single telephone call made in this case falls short of constituting participation in order to impose liability on IU for the illegal actions of Local 609.

Arguably the district court may have held the phone call between Coia and Baretta was coercive and therefore constituted a violation of § 8(b)(4)(ii)(B). The majority apparently agrees primarily relying on *Local 254* to support its position. *NLRB v. Local 254, Building Service Employees*, 359 F.2d 289 (1st Cir. 1966) (conversation between union officials and neutral employer coercive and threatening where made in context of veiled threat to engage in illegal secondary activity unless demands were met). Even if the district court did so hold in the present case, such a decision is clearly erroneous and unsupported by the record. Unlike *Local 254, supra*, the facts indicate Coia and Baretta had been friends since 1950, rather than potential adversaries in a labor dispute. Both agree the phone call was friendly. As noted above, Coia was simply informing Baretta that his trucks would be facing a picket line the next morning which Local 609 legally could establish. Overall, unlike *Local 254, supra*, there is nothing to indicate from the circumstances of the telephone call that it was either intended as a threat or perceived as such.

The district court was clearly erroneous in holding that a "close relationship," sufficient to impose liability, existed between IU and Local 609. There is no evidence that the two unions in any way conspired or jointly conducted illegal activity. The unions were totally separate entities with no ties save traditional union affiliation. Without more, an international may not be held to answer for illegal conduct of its local. *Carbon Fuel, supra: UMW v. Gibbs*, 383 U.S. 715 (1966).

In sum I think the district court plainly erred in holding IU liable to Abreen and Bernard and Wasserman. I would reverse the district court to this extent.

United States District Court for the District of Massachusetts

---

ABREEN CORP., Plaintiff

v. Civil Action 79-678-MA

LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO and MASSACHUSETTS LABORERS' DISTRICT COUNCIL and LABORERS' UNION, LOCAL 609, Defendants

BERNARD AND WASSERMAN, Plaintiffs

v. Civil Action 79-755-MA

LABORERS' INTERNATIONAL, ET AL., Defendants

OPINION

Mazzone, D.J. December 15, 1981

These two cases are brought under Section 303 of the Labor Management Relations Act of 1947 (Act), 29 U.S.C. §187. Jurisdiction of this Court is based on 28 U.S.C. §§1331,

1332 and 1337. Both actions are against the same defendants. The plaintiff in one case is the general contractor of the Natick Village Mall, and in the second case, the developer of the mall. They charge that the defendants were involved in unlawful secondary picketing in violation of 28 U.S.C. §158(b)(4). The cases were consolidated for trial since the issue of liability is dependent on the same facts.

After trial to the Court, without a jury, and pursuant to Fed.R.Civ.P. 52(a), I make the following findings of fact and conclusions of law.

I. Findings of Fact

Plaintiff, Abreen Corporation (Abreen), a Massachusetts corporation, was a general contractor engaged in the construction of the Hilton Inn and Natick Village Mall in Natick, Massachusetts beginning in August, 1978. The two principals of Abreen are Philip Abrams, Treasurer, and Larry Green, President. The plaintiffs, Martin Bernard and Isadore Wasserman (Bernard/Wasserman), are general partners in the limited partnership called Natick Village Mall Associates. They were the trustees of SN Realty Trust, the holder of the first mortgage on the Natick Village Mall project. The assets of SN Realty Trust are now held entirely by Natick Village Mall Associates.

The defendants in both cases are Laborers' Union, Local 609 (Local 609), the Massachusetts Laborers' District Council (MLDC), and the Laborers' International Union of North America, AFL-CIO (International). Local 609 is a member of the MLDC. The MLDC is the collective bargaining agent for affiliated locals in the district, including Local 609. Local 609 is also a member of the International. All three are labor organizations within the meaning of the National Labor Relations Act, 29 U.S.C. §152(5). At all times relevant thereto, Abreen was engaged in interstate commerce and in an industry affecting commerce.

On March 19, 1979, Local 609 began picketing against Seppala and Aho, the steel erection subcontractor on the project. Philip Abrams, after consulting with his counsel, modified the two gate system which was already set up at the site. Prior to March 20, Gate #1 was reserved for W.W. Contractors' employees and suppliers who were embroiled in a dispute unrelated to this action.[1] Gate #1 was now modified and identified for picketing only against Seppala and Aho and W.W. Contractors. Another gate, #2, was reserved for all others working on the job. That system was in existence until March 26, 1979, and picketing against Seppala and Aho was thus restricted to Gate #1 only.

On March 26, 1979, Local 609 continued to picket at Gate #1 against Seppala and Aho. However, pickets now appeared at Gate #2 carrying signs which read: "Minority workers on this project are working for wages which are less than area standards." No employer or any union was identified on these signs.

Construction of the Hilton Inn called for pre-cast concrete flooring. That concrete flooring (Duraflex) was purchased from Durastone Flexicore, located in Rhode Island. A shipment was scheduled for delivery on March 26, 1979. On Sunday evening, March 25, 1979, Aldo Baretta, of Durastone, received a phone call from a person he recognized as Arthur Coia. Coia is vice president of the International. Coia told Baretta to expect a problem at the Hilton job the following morning because the building trades were going to picket the job site. As a result, Durastone cancelled all shipments of pre-cast concrete to that site. Previously, Raymond Baretta, the plant manager of Durastone Flexicore, had been told by the

[1] The dispute in this case arises in the context of a broader conflict between a number of unions and the non-union subcontractors on the site. However, these other disputes, such as the picketing by Plumbers Local 448 against Patten Plumbing, are not relevant to the issues presented in this case. There is also evidence of a third gate, established between Gates #1 and #2. The existence of this gate is also not significant in the context of establishing liability in this dispute.

local shop steward that the employees would not load the trucks going to the Natick site. The instructions came from the Business Agent, James Cassino. A few days later, pickets arrived at the Durastone plant. They were not identified nor were they recognized by the plant manager. They were led by Benedetto Ottaviani, Business Agent of Local 609. When pressed by Baretta, the pickets left the area. Since Durastone refused to deliver the concrete flooring, Abreen was forced to use its own trucks to pick up the material. Finally, when Abreen trucks arrived on March 27th to pick up the concrete flooring, Durastone employees refused to load them.

On March 27, James Merloni, Jr., Vice President of Local 609, was present at both gates on the site for the first time. The following day, March 28, 1979, the picketing continued. Merloni was at the site early in the morning and met an individual at Gate #1. Both walked to Merloni's car where Merloni removed a "minority worker" sign from the trunk and gave it to the individual who then walked to Gate #2 and began picketing. Merloni walked back and forth between Gates #1 and #2 throughout the day. Later that day, Merloni moved the "minority worker" sign carrier to a point between Gates #1 and #2. "Minority worker" picketing continued at the site at Gate #2 throughout this entire period ceasing only when all picketing finally ended.

On March 28th, a truck arrived at the site to deliver steel decking. Pickets gathered in front of the truck. Maurice Blumberg, Field Representative of the MLDC, approached the driver and spoke to him. Eventually, the truck drove on the site. The driver was visibly upset and said that Blumberg had threatened to "shoot his head off" if he went on to the site.[2] Later, when a truck delivering pipe to the site was stopped by pickets at Gate #1, Abrams approached Merloni to ask him to allow the truck to enter the site. Instead Merloni told

[2] We accept this testimony as an excited utterance under Rule 803(2), Federal Rules of Evidence. The circumstances produced the stress of excitement which did not give the driver an opportunity to reflect upon his statement.

the truck operator that photographs would be taken of him and sent to his local union if he entered the jobsite. The driver left but returned one hour later and pulled the truck onto the access road across from Gate #1. This delivery was also not completed because pickets would not allow it to enter the site, nor would they allow an Abreen forklift truck to leave the site to unload the truck. On the same day, a Barker steel truck arrived at Gate #2 and would not cross the picket line to make the delivery.

On March 29, 1979, the picketing continued at both gates as described above. Blumberg was again on the site. He stated to Abrams and Green that the picketing would be successful in this instance because, unlike a previous encounter, the building trades were united in this case. He also stated that this job was not going to be finished "non-union."

James Merloni, who was at both gates that morning again, was also approached at this time to change the picketing so as to allow deliveries to be made. He refused to do so. Trucks arrived to make deliveries of material for the job and were turned away. Blumberg threw himself in front of a Rosenfeld concrete truck to prevent its entry and, consequently, was arrested by the Natick Police. Merloni, in a threatening voice, told the driver of another truck, containing the steel that was turned away the previous day, that the driver "did not want to come into the site." The truck then drove off.

On March 30, 1979, the same picketing system continued and Merloni was at both gates during the day. The same picketing continued throughout the following weeks until April 16, 1979. On Monday, April 9, 1979, the "minority workers" signs were changed to say that Local 609 was picketing Abreen Corporation. Abreen had no notice or any knowledge of any dispute with any minority workers.

On April 16, 1979, a holiday, a march attended by several thousand construction workers took place at the site. Fearing trouble, Abrams scheduled no work on the project. Speeches were made, including one by James Merloni, Sr., who was the

President of both MDLC and Local 609. Following April 16th, there was only sporadic picketing and eventually, it ceased entirely.

As a result of the picketing, from March 19 through April 16, deliveries of essential materials were not made to the job as scheduled. Fixturing of one large tenant of the mall, K-Mart, had to be postponed as a result of which the opening of the store was delayed. The completion of the project was delayed, causing damages to both plaintiffs which would not have been incurred but for the picketing. The developers, Bernard/Wasserman, incurred the expense of additional financing charges as well as suffering the loss of rents from tenants of the mall. Damages were also incurred by Abreen Corporation as detailed below, but included, generally, costs of security, redesign, replacement of material, substitute trucking and labor.[3]

II. Conclusion of Law

On the basis of the above findings, I conclude that the picketing between March 26 and April 16, 1979 was unlawful secondary picketing in violation of 29 U.S.C. §158(b)(4). The picketing was unlawful because: (1) it picketed the posted

[3] The Court is required to make an assessment of the credibility of witnesses. The evidence in this case was sharply conflicting in certain instances. In general, I have not accepted the testimony of Merloni and Blumberg. Their testimony was uncorroborated and inconsistent. For example, Blumberg said that he was not on the picket line, but several photographs show that he was present at both gates on many occasions. Similarly, Merloni admits that he placed Local 609 pickets at both gates, claiming that the gates had become contaminated because the reserve gate system was being violated, yet he never mentioned this in his account to the National Labor Relations Board. I further believe he was responsible for the sham "minority worker" pickets. There was never any dispute with any minority workers, he had custody of the signs and controlled the positioning of the pickets. I interpret this action to be a deception and meant to injure Abreen by conveying an image of unfairness which was untrue and undeserved. Accordingly, I regard his testimony as lacking credibility and weight.

neutral gate at the site set up by Abreen; (2) the signs carried by the pickets failed to identify the employer with whom the pickets had the primary dispute; and (3) the object of the picketing was to coerce neutral contractors and suppliers not to do business or to deliver services and supplies to the project while there were non-union subcontractors working on the site. *Sailor's Union of the Pacific,* (Moore Dry Dock), 92 NLRB 547 (1950).

As a result of the unlawful secondary picketing, Abreen and Bernard/Wasserman were damaged. The defendants, Local 609, MLDC, and the International are jointly and severally liable for both plaintiffs' damages because their officers and agents, through their acts and statements, participated directly in the unlawful activity and actively promoted, supported and encouraged the unlawful activities. *Noranda Aluminum, Inc.* v. *United Brotherhood of Carpenters and Joiners, AFL-CIO,* 528 F.2d 1304 (8th Cir.), *cert. denied,* 429 U.S. 835 (1976).

Section 303 of the Act prohibits inducing, threatening, or coercing neutral employers where the object of the activity is to cause the neutral employers, who are not concerned in the primary dispute, to cease doing business with the employer with whom the labor organizations have a primary dispute. The picketing in this case was directed at secondary or neutral parties and intended to intimidate those parties with the purpose of preventing them from continuing their service to the project. *Pickens-Bond Construction Co.* v. *United Brotherhood of Carpenters,* 586 F.2d 1234 (8th Cir. 1978).

The actions of the representatives of the defendants were clearly intended to coerce Abreen not to do business with the non-union subcontractors. Both James Merloni, Jr., and Maurice Blumberg threatened truckers who were attempting to enter the site and physically obstructed other deliveries. Their acts and statements were clear violations of the established reserve gate system.

While there was no presence of the International at the site, the actions of its representative, Arthur Coia, in calling Baretta are sufficient to impose liability upon it. There was no purpose for the call other than to promote the interest of the picketing. It makes no difference if the tone of the call was friendly; the message was clear — the pre-cast concrete was not to be delivered — and the message had the desired effect. Given the close relationships among the personalities, as well as the labor organizations they represented, there is ample basis to conclude that the picketing was the result of a concerted and coordinated effort justifying joint and several liability. *United Mine Workers* v. *Gibbs*, 383 U.S. 715 (1966).

Finally, both plaintiffs fall within that class of persons who are granted a private right of action for damages under Section 303 of the Act. The losses in business or property incurred by both plaintiffs were directly related to the violative practices of the defendants.

III. Damages

The amount of damages depended largely on the period of time that the unlawful picketing was taking place. I find that period to be from March 26, 1979, when the first violation of the established reserve gate system took place, to April 16, 1979, when the picketing ceased except for sporadic instances not clearly described by the evidence. To some extent, damages beyond that three week period were necessarily and reasonably incurred by both plaintiffs, as detailed below.

1. *Abreen's Damages*

No damages were claimed for delay in the completion of the job. The damages incurred were:

1. Security services from the Natick Police Department were necessary and reasonable for a period of 4 weeks, ending the week of April 16, 1979		$17,023.50
2. Reasonable attorneys' fees incurred in efforts to stop the unlawful picketing		7,935.00
3. Photography expenses		4,621.00
4. Substitute trucking to haul land fill to site when picketing was taking place		5,165.00
5. Design and material changes incurred		
a. design	7,730.000	
b. material	32,320.00	
c. safety nets	3,136.00	
d. fireproofing	7,042.00	
e. additional cutting and curing	5,394.00	
f. concrete slab	5,304.00	
g. labor for concrete pouring	2,532.00	
h. trucking	1,461.88	
i. labor for installation of substituted design	20,600.00	
		85,519.88
Total of Abreen's damages:[4]		$120,264.38

2. *Bernard/Wasserman Damages*

These damages consists largely of loss of rental income and additional financing charges of $917 per day ($1,952 × 47%)

[4] Damages are not awarded for attorneys' fees which were not shown to be substantially related to the picketing. Damages are also not awarded for claims occurring after the picketing, e.g., substitute trucking, because these claims were not related to the picketing. Finally, damages were not awarded for lost time, of various Abreen personnel since there was no showing that this

for the delay. As could be expected, whenever a sizable construction project is involved, as here, evidence as to delay is imprecise and inconsistent, but I am satisfied and, therefore, conclude that in this case the delay as to Bernard/Wasserman attributed to the pickets was no more than 21 days.

The testimony was conflicting concerning the extent of the delay caused by the picketing. The actual pickets themselves could only have interfered directly for a maximum of 22 days (March 26 to April 16). In the case of K-Mart, it is undisputed that this store, the first to be completed, was not ready for fixturing until April 2, thus limiting the period of direct delay to the 15 days prior to April 16 when the picketing ceased. The testimony is uncontroverted that the developer sent a letter to K-mart informing them that the store was available for fixturing. There is no credible evidence that fixturing was not possible immediately upon the cessation of the illegal picketing. Thus, for K-Mart, the damages are limited to the period of April 2 to April 16, (15 days), plus a reasonable period of time of six days within which to reschedule deliveries and fixturing, or a total of 21 days.

Although direct proof is not essential, there is no evidence at all that other prospective tenants were ready for fixturing as early as April 2. Therefore, it is impossible to attribute a lengthier delay in their opening than that proven for K-mart. Consequently, all damages for the developers were calculated on the 21 day period in early April.

---

time would have been spent on other profit-productive efforts. Failing that showing, this effort was no more than what is normally expected of executive personnel.

a. Additional financing for 21 days at $917 per day		$ 19,257.00
b. Loss of rental income for 21 days[5] of		
K-Mart	18,414.38	
Papa Gino's	1,251.25	
Tandy	1,050.00	
Kinney Shoe	1,750.00	
Walden Books	1,434.38	
Service Merchandise	10,760.75	
		34,660.76
c. Reasonable attorneys' fees incurred in efforts to stop the unlawful picketing		1,185.00
Total Bernard/Wasserman damages:		$55,102.76

CONCLUSION

Judgment is to be entered for Abreen Corporation against all three defendants, jointly and severally, in the amount of $120,264.38, plus costs.

Judgment is to be entered for Bernard/Wasserman against all three defendants, jointly and severally, in the amount of $55,102.76, plus costs.

SO ORDERED.

A. DAVID MAZZONE

United States District Judge

[5] Rental totals are calculated on the basis of 3/4 of the monthly rent, i.e., for K-Mart (.75×24,552.50) = $18,414.38.

United States District Court for the District of Massachusetts

CIVIL ACTION FILE NO. 79-678-MA

ABREEN CORPORATION,

PLAINTIFF

vs.

LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO and MASSACHUSETTS LABORERS' DISTRICT COUNCIL and LABORERS' UNION, LOCAL 609,

DEFENDANTS

JUDGMENT

This action came on for trial before the Court and a jury, Honorable A. David Mazzone, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict, in an opinion entered on December 15, 1981.

It is Ordered and Adjudged,

Judgment for the plaintiff Abreen Corporation against all three defendants, jointly and severally, in the amount of One Hundred and Twenty Thousand, Two Hundred and Sixty-four Dollars and Thirty-eight Cents ($120,264.38), plus costs.

Dated at Boston, Massachusetts, this 16th day of December, 1981.

GEORGE F. McGRATH
Clerk of Court

[Signed]
Deputy Clerk

United States District Court for the District of Massachusetts

CIVIL ACTION FILE NO. 79-755-MA

BERNARD AND WASSERMAN,

PLAINTIFFS

vs.

LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO and MASSACHUSETTS LABORERS' DISTRICT COUNCIL and LABORERS' UNION, LOCAL 609,

DEFENDANTS

JUDGMENT

This action came on for trial before the Court and a jury, Honorable A. David Mazzone, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict, in an opinion entered on December 15, 1981.

It is Ordered and Adjudged,

Judgment for the plaintiffs Bernard and Wasserman against all three defendants, jointly and severally, in the amount of Fifty-five Thousand, One Hundred and Two Dollars and Seventy-six Cents ($55,102.76), plus costs.

Dated at Boston, Massachusetts, this 16th day of December, 1981.

GEORGE F. McGRATH
Clerk of Court

[Signed]
Deputy Clerk

THIS PAGE INTENTIONALLY
LEFT BLANK